

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

10 SUZANNE SMEDT, individually and on behalf) Case No. 5:12-CV-03029-EJD
11 of all others similarly situated,)
12 Plaintiff,) **ORDER GRANTING MOTION TO**
13 v.) **PARTIALLY DISMISS**
14 THE HAIN CELESTIAL GROUP, INC.,) [Re: Docket No. 55]
15 Defendant.)
16 _____)
17

18 Presently before the Court is Defendant The Hain Celestial Group, Inc.’s (“Defendant” or
19 “Hain”) Motion to Dismiss Plaintiff Suzanne Smedt’s Second Amended Complaint (“SAC”).
20 Plaintiff filed this putative class action against Defendant alleging that several of Defendant’s
21 products have been improperly labeled so as to amount to misbranding and deception in violation
22 of several California and federal laws.

23 Per Civ. L.R. 7-1(b), the motion was taken under submission without oral argument.
24 Having fully reviewed the parties’ papers, the Court grants Defendant’s motion.

25 **I. BACKGROUND**

26 Plaintiff filed her original Complaint in this case on June 2, 2012. Dkt. No. 1. Plaintiff’s
27 First Amended Complaint (“FAC”) was filed on October 1, 2012. Dkt. No. 25. Defendant filed a
28 Motion to Dismiss, which was granted per this Court’s order on August 6, 2013. Dkt. No. 51.

1 Plaintiff's warranty claims were dismissed with prejudice and the remainder of her claims were
2 dismissed for failure to meet the Rule 9(b) pleading standard.

3 Plaintiff filed the SAC on August 30, 2013 on behalf of herself and putative class of all
4 persons in the United States who have purchased the same products and other of Defendant's
5 similar food products. Dkt. No. 52. Defendant filed the present Motion to Dismiss on September
6 27, 2013. Dkt. No. 55.

7 Plaintiff is a California consumer who, since June 12, 2008, purchased Terra Stripes &
8 Blues Sea Salt Potato Chips, Coconut Dream Coconut Drink (Original), and Sensible Portions Sea
9 Salt Garden Veggie Straws. Dkt. No. 52 ¶ 2. Plaintiff argues that the following representations on
10 the packaging of these and other of Defendant's food products were unlawful and/or misleading:
11 (1) "no trans fat" (2) "evaporated cane juice" ("ECJ") and (3) "all natural." Plaintiff argues that the
12 following "substantially similar" products bear the identical representations, violate the same
13 regulations in the same manner, and are essentially the exact same product, except for flavor, and
14 should be included in the "class products": Terra Exotic Harvest Sea Salt Chips, Terra Exotic
15 Harvest Sweet Onion Chips, Terra Stripes & Blues Gourmet Barbeque Chips, Terra Sweets &
16 Beets Chips, Terra Sweets & Carrots Chips, Terra Blues Potato Chips, Terra Kettles Sea Salt
17 Krinkle Cut Potato Chips, Coconut Dream Coconut Drink Vanilla, Coconut Dream Coconut Drink
18 Enriched Vanilla, Sensible Portions Rosemary Olive Oil Garden Veggie Straws, and Sensible
19 Portions Lightly Salted Garden Veggie Straws. Id. ¶ 3.

20 Plaintiff alleges the following causes of actions: violation of California's Unfair
21 Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 et seq., (counts 1-3); violation of the
22 False Advertising Law ("FAL"), Cal. Bus. & Prof. Code § 17500 et seq., (counts 4-5); and
23 violation of the Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750 et seq., (count
24 6).

25 **II. LEGAL STANDARD**

26 **A. Rule 8(a)**

27 Federal Rule of Civil Procedure 8(a) requires a plaintiff to plead each claim with sufficient
28 specificity to "give the defendant fair notice of what the . . . claim is and the grounds upon which it

1 rests.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal quotations omitted). A
2 complaint which falls short of the Rule 8(a) standard may be dismissed if it fails to state a claim
3 upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). “Dismissal under Rule 12(b)(6) is
4 appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a
5 cognizable legal theory.” Mendiondo v. Centinela Hosp. Med. Ctr., 521 F.3d 1097, 1104 (9th Cir.
6 2008). Moreover, the factual allegations “must be enough to raise a right to relief above the
7 speculative level” such that the claim “is plausible on its face.” Twombly, 550 U.S. at 556-57.

8 When deciding whether to grant a motion to dismiss, the court generally “may not consider
9 any material beyond the pleadings.” Hal Roach Studios, Inc. v. Richard Feiner & Co., 896 F.2d
10 1542, 1555 n.19 (9th Cir. 1990). The court must accept as true all “well-pleaded factual
11 allegations.” Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009). The court must also construe the
12 alleged facts in the light most favorable to the plaintiff. Love v. United States, 915 F.2d 1242,
13 1245 (9th Cir. 1988). However, the court may consider material submitted as part of the complaint
14 or relied upon in the complaint, and may also consider material subject to judicial notice. See Lee
15 v. City of Los Angeles, 250 F.3d 668, 688-69 (9th Cir. 2001). But “courts are not bound to accept
16 as true a legal conclusion couched as a factual allegation.” Twombly, 550 U.S. at 555.

17 **B. Rule 9(b)**

18 Fraud-based claims are subject to heightened pleading requirements under Federal Rule of
19 Civil Procedure 9(b). In that regard, a plaintiff alleging fraud “must state with particularity the
20 circumstances constituting fraud.” Fed. R. Civ. P. 9(b). The allegations must be “specific enough
21 to give defendants notice of the particular misconduct which is alleged to constitute the fraud
22 charged so that they can defend against the charge and not just deny that they have done anything
23 wrong.” Semegen v. Weidner, 780 F.2d 727, 731 (9th Cir. 1985). To that end, the allegations
24 must contain “an account of the time, place, and specific content of the false representations as well
25 as the identities of the parties to the misrepresentations.” Swartz v. KPMG LLP, 476 F.3d 756, 764
26 (9th Cir. 2007) (citation omitted). Averments of fraud must be accompanied by the “who, what,
27 when, where, and how” of the misconduct charged. Vess v. Ciba-Geigy Corp. USA, 317 F.3d
28 1097, 1106 (9th Cir. 2003) (citation omitted). Additionally, “the plaintiff must plead facts

1 explaining why the statement was false when it was made.” Smith v. Allstate Ins. Co., 160
2 F. Supp. 2d 1150, 1152 (S.D. Cal. 2001); see also In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541,
3 1549 (9th Cir. 1994) (en banc) (superseded by statute on other grounds).

4 **C. Rule 12(b)(1)**

5 A party may file a motion to dismiss with the Court for lack of subject matter jurisdiction.
6 Fed. R. Civ. P. 12(b)(1). Federal courts are courts of limited jurisdiction, adjudicating only cases
7 which the Constitution and Congress authorize. Kokkonen v. Guardian Life Ins. Co. of America,
8 511 U.S. 375, 377 (1994). An Article III federal court must ask whether a plaintiff has suffered
9 sufficient injury to satisfy the “case or controversy” requirement of Article III of the U.S.
10 Constitution. To satisfy Article III standing, a plaintiff must allege: (1) an injury-in-fact that is
11 concrete and particularized, as well as actual and imminent; (2) that the injury is fairly traceable to
12 the challenged action of the defendant; and (3) that it is likely (not merely speculative) that the
13 injury will be redressed by a favorable decision. Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.,
14 Inc., 528 U.S. 167, 180-81 (2000); Lujan v. Defenders of Wildlife, 504 U.S. 555, 561-62 (1992).

15 At least one named plaintiff must have suffered an injury-in-fact. See Lierboe v. State
16 Farm Mut. Auto. Ins. Co., 350 F.3d 1018, 1022 (9th Cir. 2003) (“if none of the named plaintiffs
17 purporting to represent a class establishes the requisite of a case or controversy with the
18 defendants, none may seek relief on behalf of himself or any other member of the class”).

19 A suit brought by a plaintiff without Article III standing is not a “case or controversy,” and
20 an Article III federal court therefore lacks subject matter jurisdiction over the suit. Steel Co. v.
21 Citizens for a Better Env’t, 523 U.S. 83, 101 (1998). “A party invoking the federal court’s
22 jurisdiction has the burden of proving the actual existence of subject matter jurisdiction.”
23 Thompson v. McCombe, 99 F.3d 352, 353 (9th Cir. 1996). If a court determines that it lacks
24 subject matter jurisdiction, the court must dismiss the action. Fed. R. Civ. P. 12(h)(3).

25 **III. DISCUSSION**

26 Plaintiff frames this case as consisting of two facets: (1) the “unlawful” part, claiming that
27 Defendant’s packaging and labels violate state and federal laws, making the products “misbranded”
28 and therefore illegal to sell or possess, lacking economic value, and legally worthless; and (2) the

1 “fraudulent” part, claiming that the labels are misleading, deceptive, unfair, and fraudulent.
2 Defendant argues that Plaintiff’s claims regarding unpurchased products, ECJ claims, and the cause
3 of action under the “unlawful” prong of the UCL should be dismissed.¹

4 **A. Statutory Framework**

5 The operative statute in this matter is the Food, Drug, and Cosmetic Act (“FDCA”), 21
6 U.S.C. § 301 *et seq.*, as amended by the Nutrition Labeling and Education Act of 1990 (“NLEA”),
7 21 U.S.C. § 343 *et seq.* 21 U.S.C. § 343 establishes the conditions under which food is considered
8 “misbranded.” Generally, food is misbranded under 21 U.S.C. § 343(a)(1) if “its labeling is false
9 or misleading in any particular.”

10 The California Sherman Food, Drug, and Cosmetic Law (“Sherman Law”), Cal. Health &
11 Safety Code § 109875 *et seq.*, incorporates the requirements of the FDCA as the food labeling
12 requirements of the state of California. Plaintiff brings claims for relief under the UCL, FAL, and
13 CLRA based on Defendant’s alleged violations of the Sherman Law. The UCL prohibits business
14 practices that are unlawful, unfair, or fraudulent. The “fraudulent” prong of the UCL “requires a
15 showing [that] members of the public are likely to be deceived.” Wang v. Massey Chevrolet, 97
16 Cal. App. 4th 856, 871 (2002). The “unlawful” prong of the UCL “borrows violations of other
17 laws and treats them as independently actionable.” Daugherty v. Am. Honda Motor Co., Inc., 144
18 Cal. App. 4th 824, 837 (2006). As for the “unfair” prong, “California appellate courts disagree on
19 how to define an ‘unfair’ act or practice in the context of a UCL consumer action.” Morgan v.
20 Wallaby Yogurt Co., Inc., No. 13-CV-00296-WHO, 2014 WL 1017879, at *11 (N.D. Cal. March
21 13, 2014) (citing Davis v. Ford Motor Credit Co., 179 Cal. App. 4th 581, 594 (2009)). Some
22 courts have held that the “unfair” prong requires alleging a practice that “offends an established
23 public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to
24 consumers,” and the policy must be “tethered to specific constitutional, statutory or regulatory
25 provision.” Bardin v. Daimlerchrysler Corp., 136 Cal. App. 4th 1255, 1263, 1266 (2006) (citations
26 omitted). Other courts have held that the court must apply a balancing test that “weigh[s] the

27
28 ¹ Defendant does not move to dismiss Plaintiff’s “no trans fat” and “all natural” claims, so the Court does not analyze
those claims in this order.

1 utility of the defendant's conduct against the gravity of the harm to the alleged victim." Schnall v.
2 Hertz Corp., 78 Cal. App. 4th 1144, 1167 (2000).

3 **B. Primary Jurisdiction**

4 Defendant argues that Plaintiff's ECJ claims should be dismissed or stayed under the
5 primary jurisdiction doctrine. The primary jurisdiction doctrine allows courts to "stay proceedings
6 or to dismiss a complaint without prejudice pending the resolution of an issue within the special
7 competence of an administrative agency." Ivie v. Kraft Foods Global, Inc., No. C-12-02554-
8 RMW, 2013 WL 685372, at *5 (N.D. Cal. Feb. 25, 2013) (quoting Clark v. Time Warner Cable,
9 523 F. 3d 1110, 1114 (9th Cir. 2008)). Courts consider the following factors in deciding whether
10 the doctrine of primary jurisdiction applies: "(1) the need to resolve an issue that (2) has been
11 placed by Congress within the jurisdiction of an administrative body having regulatory authority
12 (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory
13 authority that (4) requires expertise or uniformity in administration." Ivie, 2013 WL 685372, at *5.

14 Where determination of a plaintiff's claim would require a court to decide an issue
15 committed to the FDA's expertise without a clear indication of how the FDA would view the issue,
16 courts of this district have found that dismissal or stay under the primary jurisdiction doctrine is
17 appropriate. See Hood v. Wholesoy & Co., Modesto Wholesoy Co. LLC, No. 12-CV-5550-YGR,
18 2013 WL 3553979, at *5-6 (N.D. Cal. July 12, 2013) (ECJ and soy yogurt claims dismissed
19 because the FDA's position is unsettled); Astiana v. Hain Celestial, 905 F. Supp. 2d 1013, 1016-17
20 (N.D. Cal. 2012) (holding that "[i]n absence of any FDA rules or regulations (or even informal
21 policy statements) . . . the court declines to make any independent determination of whether [the
22 label] was false or misleading" and the claims were barred under the primary jurisdiction doctrine).

23 In contrast, however, where FDA policy is clearly established with respect to what
24 constitutes an unlawful or misleading label, the primary jurisdiction doctrine is inapplicable
25 because there is little risk that the courts will undermine the FDA's expertise. See Brazil v. Dole
26 Food Co., 935 F. Supp. 2d 947, 959 (N.D. Cal. 2013) (where the FDA has established requirements
27 applicable to the violations, there is no risk of undercutting the FDA's judgment and authority, thus
28 a stay is not necessary).

With regard to ECJ claims, some courts in this district have decided that the FDA's position on the use of the term ECJ is unsettled and should therefore be determined by the FDA, not by courts. See Hood, 2013 WL 3553979, at *5-6 ("with respect to 'evaporated cane juice' . . . the FDA's position is not yet settled . . . the Court finds it appropriate to defer to the authority and expertise of the FDA. . . ."); Figy v. Amy's Kitchen, No. C-13-03816-SI, 2014 WL 1379915 (N.D. Cal. Apr. 9, 2014). Other courts – including this Court – have found that the FDA's guidance suggests that the agency does not view the issue as unsettled and the claim is not precluded by the primary jurisdiction doctrine. See Swearingen v. Yucatan Foods, L.P., No. C-13-3544-RS, 2014 WL 553537 (N.D. Cal. Feb. 7, 2014); Gitson v. Clover Stornetta Farms, No. C-13-01517-EDL, 2014 WL 172338, at *12 (N.D. Cal. Jan. 15, 2014); Morgan v. Wallaby Yogurt Co., Inc., No. 13-CV-0296-WHO, 2013 WL 5514563, at *4 (N.D. Cal. Oct. 4, 2013); Werdebaugh v. Blue Diamond Growers, No. 12-CV-02724-LHK, 2013 WL 5487236, at *8-9 (N.D. Cal. Oct. 2, 2013) (FDA, through guidance and warning letters, has articulated a position on ECJ); Kane v. Chobani, Inc., No. 12-CV-2425-LHK, 2013 WL 3703981, at *17 (N.D. Cal. Jul. 12, 2013), vacated by 2013 WL 5529723 (N.D. Cal. Jul. 25, 2013), reconsidered by 2013 WL 5289253 (N.D. Cal. Sept. 19, 2013) (denying motion to dismiss ECJ claim on primary jurisdiction ground, but granting motion to dismiss claim that use of ECJ in yogurt violated standards of identity for yogurt on primary jurisdiction grounds)²; Ivie, 2013 WL 685372, at *12 (holding that ECJ claims could go forward under "deceptive" prong of UCL); Samet v. Procter & Gamble, Co., No. 12-CV-01891-PSG, 2013 WL 3124647, at *8 (N.D. Cal. June 18, 2013) (FDA regulation that common or usual name be used to identify ingredients encompasses ECJ).

At this juncture, the Court must dismiss the ECJ claims based on the primary jurisdiction doctrine. In the past, this Court, along with other courts in this district, has found that the primary jurisdiction doctrine did not bar adjudication of ECJ claims. However, in light of the FDA's March 5, 2014 notice in the Federal Register reopening the comment period for the draft guidance on the

² In Kane, 2013 WL 5289253, the court ultimately dismissed plaintiffs' ECJ allegations for failure to sufficiently state a claim under Rule 8(a) and Rule 9(b) because plaintiffs did not adequately plead that they believed the yogurts contained "only natural sugars from milk and fruit and did not contain added sugars or syrups." Id. at *7.

1 term ECJ, this Court finds it appropriate to apply the doctrine of primary jurisdiction in this case.³
2 Draft Guidance for Industry on Ingredients Declared as Evaporated Cane Juice; Reopening of
3 Comment Period; Request for Comments, Data, and Information, 79 Fed. Reg. 12507-08 (Mar. 5,
4 2014). The notice states that the FDA has not resolved the issue of whether ECJ is the common or
5 usual name of the particular sweetener and that the FDA is engaged in active rulemaking on the
6 issue. The notice explains that the FDA is seeking additional information on the method of
7 production of ECJ, the differences between ECJ and other sweeteners, and the basic characterizing
8 properties of ECJ. Resolution of these specific issues requires the expertise of the FDA rather than
9 the courts. The notice also states that after reviewing the comments, the FDA intends to revise the
10 draft guidance, if appropriate, and issue it in final form. If the Court proceeds with this action and
11 issues a decision that is contrary to the FDA's formal position on ECJ, it would disrupt the uniform
12 application of the FDA's regulatory rules. Figy, 2014 WL 1379915, at *3; see United States v.
13 Philip Morris USA Inc., 686 F.3d 832, 837 (D.C. Cir. 2012) ("The primary jurisdiction doctrine
14 rests . . . on a concern for uniform outcomes (which may be defeated if disparate courts resolve
15 regulatory issues inconsistently). . . ."). For this reason, courts find it appropriate to defer to an
16 agency when, as here, the agency is in the process of making a determination on a key issue in the
17 litigation. Figy, 2014 WL 1379915, at *3.

18 In conclusion, applying the doctrine of primary jurisdiction allows the Court to defer to the
19 FDA's expertise on food labeling and will ensure uniformity in administration of the regulations
20 regarding ECJ. Therefore, the Court finds it appropriate to dismiss the ECJ claims without
21 prejudice pursuant to the doctrine of primary jurisdiction.

22 At this point, the Court need not assess whether Plaintiff adequately alleged reliance for her
23 "unlawful" claims because the ECJ claims are dismissed on primary jurisdiction grounds. As this
24 Court has stated in previous orders, for all claims under the UCL that arise from deceptive
25 advertising, misrepresentation, or fraudulent conduct, as all of Plaintiff's claims here do, Plaintiff
26 must plead reliance in accordance with Rule 9(b) and show that "members of the public are likely

27 ³ The Court notes that the FDA's March 5, 2014 notice did not exist at the time that either party filed its pleadings, and
28 therefore was not raised by either party. Per Federal Rule of Evidence 201, the Court takes judicial notice of the
FDA's March 5, 2014 notice in the Federal Register.

1 to be deceived.” See Thomas v. Costco, 12-CV-02908-EJD, 2014 WL 1323192 (N.D. Cal. Mar.
2 31, 2014); Figy, 2013 WL 6169503 (N.D. Cal. Nov. 25, 2013); Kwikset, 51 Cal. 4th 310; Wilson
3 v. Frito-Lay N. Am., 961 F. Supp. 2d 1134 (N.D. Cal. 2013).

4 **C. Standing**

5 Defendant argues that Plaintiff has no standing to sue for products not purchased. As
6 noted, to establish Article III standing, a plaintiff must allege facts showing an injury-in-fact,
7 causation, and redressability such that the injury will be likely redressed by a decision in the
8 plaintiff’s favor. Lujan, 504 U.S. at 561-62. An injury-in-fact requires showing “an invasion of a
9 legally protected interest which is concrete and particularized and actual or imminent, not
10 conjectural or hypothetical.” Id. at 560 (citations and internal quotation marks omitted).

11 The UCL and FAL incorporate the Article III standing requirements, but additionally
12 require that the plaintiff plead an economic injury. Kwikset Corp. v. Superior Court, 51 Cal. 4th
13 310, 322-23 (2011); see also TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 825 n.1 (9th
14 Cir. 2011) (“Plaintiffs filing an unfair competition suit must prove a pecuniary injury . . . and
15 ‘immediate’ causation. . . . Neither is required for Article III standing.” (internal citations
16 omitted)). Proposition 64 was enacted in 2004 as a means of “confin[ing] [UCL] standing to those
17 actually injured by a defendant’s business practices and [] curtail[ing] the prior practice of filing
18 suits on behalf of clients who have not used the defendant’s product or service, viewed the
19 defendant’s advertising, or had any other business dealing with the defendant.” Kwikset, 51 Cal.
20 4th at 321 (internal citations omitted). Under the UCL and FAL, a plaintiff suffers an injury-in-fact
21 when he or she has “(1) expended money due to the defendants’ acts of unfair competition; (2) lost
22 money or property; or (3) been denied money to which he or she has a cognizable claim.”
23 Chacanaca v. Quaker Oats Co., 752 F. Supp. 2d 1111, 1125 (N.D. Cal. 2010).

24 To satisfy the injury-in-fact requirement for unfair competition claims, “courts in California
25 require that plaintiffs demonstrate the purchase of products as a result of deceptive advertising.”
26 Id. To plead actual reliance, the “plaintiff must allege that the defendant’s misrepresentations were
27 an immediate cause of the injury-causing conduct.” In re Tobacco II Cases, 46 Cal. 4th 298, 328
28 (2009). However, “the plaintiff is not required to allege that those misrepresentations were the sole

1 or even the decisive cause of the injury-producing conduct.” Id. A plaintiff can satisfy the UCL’s
2 standing requirement by alleging that he or she would not have bought the product but for the
3 alleged misrepresentation. Kwikset, 51 Cal. 4th at 330.

4 The California Supreme Court has held that the phrase “as a result of” in UCL section
5 17204 “imposes an actual reliance requirement on plaintiffs prosecuting a private enforcement
6 action under the UCL’s fraud prong.” Tobacco II, 46 Cal. 4th at 326. This also applies under the
7 UCL’s “unlawful” and “unfair” prong, where the predicate unlawfulness is misrepresentation and
8 deception. Hale v. Sharp Healthcare, 183 Cal. App. 4th 1373, 1385 (2010); see also Kwikset, 51
9 Cal. 4th 310; In re Actimmune Mkt. Litig., No. 08-2376, 2010 WL 3463491, at *8 (N.D. Cal. Sept.
10 1, 2010), aff’d, 464 F. App’x 651 (9th Cir. 2011); Brazil, 935 F. Supp. 2d 947; Kane, 2014 WL
11 657300, at *5 (N.D. Cal. Feb. 20, 2014).

12 While courts are split as to whether actual purchase is required to establish the requisite
13 injury-in-fact, many courts in this district have found that claims regarding unpurchased products
14 similar to Plaintiff’s do not survive a motion to dismiss, either simply because the plaintiff did not
15 purchase the products or because the unpurchased products were not substantially similar to the
16 purchased products. See Ivie, 961 F. Supp. 2d 1033, 1046 (N.D. Cal. 2013) (“there can be no
17 requisite pecuniary injury where plaintiff did not herself purchase the product at issue”); Larsen v.
18 Trader Joe’s Co., No. C-11-05188-SI, 2012 WL 5458396, at *5 (N.D. Cal. June 14, 2012) (finding
19 that as a matter of law plaintiffs could not have suffered a particularized injury for products they
20 did not purchase); Major v. Ocean Spray Cranberries, Inc., No. 12-CV-03067-EJD, 2013 WL
21 2558125 (N.D. Cal. June 10, 2013) (denying class certification due to lack of typicality where
22 plaintiff did not purchase named products); Granfield v. NVIDIA Corp., No. C-11-05403-JW,
23 2012 WL 2847575, at *6 (N.D. Cal. July 11, 2010) (“when a plaintiff asserts claims [for defective
24 product or false advertising] . . . claims relating to products not purchased must be dismissed for
25 lack of standing”); Carrea v. Dreyer’s Grand Ice Cream, Inc., No. C-10-01044-JSW, 2011 WL
26 159380, at *3 (N.D. Cal. Jan. 10, 2011) (dismissing claims based on products other than those
27 purchased by the plaintiff). In Miller v. Ghirardelli Chocolate Co., 912 F. Supp. 2d 861, 871 (N.D.
28 Cal. 2012), the court analyzed why the products that plaintiff did not buy were not substantially

1 similar to those he did buy. The court determined that because the identified products were
2 different, looked different, and were labeled differently, plaintiff had not alleged “the sort of
3 similarity of representation or product” that would amount to “the same basic mislabeling practice”
4 such as was found in cases where the court found the unpurchased products to be substantially
5 similar to the purchased products.

6 Where courts have found the unpurchased products to be substantially similar, claims for
7 unpurchased products have survived motions to dismiss. In Astiana v. Dreyer's Grand Ice Cream,
8 Inc., Nos. C-11-2910-EMC, C-11-3164-EMC, 2012 WL 2990766 (N.D. Cal. July 20, 2012), the
9 court allowed plaintiff's claims for unpurchased products to proceed because the products were of
10 the same type (ice cream), the labels of the products were the same, and the ice creams had many
11 of the same ingredients. Id. at *13. In Anderson v. Jamba Juice Co., 888 F. Supp. 2d 1000 (N.D.
12 Cal. 2012), the court found that the unpurchased products were substantially similar to the
13 purchased products because the same alleged misrepresentation was on all the products and all the
14 products contained allegedly non-natural ingredients. Id. at 1006.

15 In this case, Plaintiff asserts claims regarding eleven products she did not buy. Plaintiff
16 alleges that the products “make the exact same representations, violate the exact same regulations
17 in the same manner, and are essentially the exact same products, except for flavor” as those
18 products she did purchase. Dkt. No. 52 ¶ 3. However, there is nothing in the SAC regarding the
19 products' respective ingredients or packaging showing how the unpurchased products are
20 substantially similar to the purchased products. See Ghirardelli, 912 F. Supp. 2d at 871; Dysthe v.
21 Basic Research LLC, No. CV-09-8013-AG, 2011 WL 5868307, at *4 (C.D. Cal. June 13, 2011)
22 (unpurchased products were not “nearly identical” to purchased products because the number of
23 ingredients was different and the packaging was different). Therefore, this Court cannot determine
24 from the pleadings whether the named products are, in fact, substantially similar to the purchased
25 products. Plaintiff's assertion that the products are “essentially the same” is too ambiguous,
26 especially considering the heightened pleading standard of Rule 9(b) applies as Plaintiff's
27 allegations “sound in fraud,” as described in this Court's previous order. Dkt. No. 51. Plaintiff has
28 not alleged the similarity of the products with sufficient particularity.

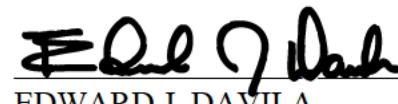
1 Accordingly, Plaintiff lacks standing to bring claims as to unpurchased products and the
2 claims are dismissed without prejudice.

3 **IV. CONCLUSION**

4 For the reasons discussed above, Defendant's Motion to Partially Dismiss is GRANTED
5 and Plaintiff's claims regarding evaporated cane juice as well as claims for unpurchased products
6 are dismissed without prejudice.

7
8 **IT IS SO ORDERED**

9 Dated: May 30, 2014


10 EDWARD J. DAVILA
11 United States District Judge